UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

WASTE MANAGEMENT OF TENNESSEE, INC.
d/b/a WASTE MANAGEMENT OF MEMPHIS[1]
Employer

and

JESSE ALLEN **Case 26-RD-1127**
Petitioner

and

TEAMSTERS LOCAL 667
Union

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Waste Management of Tennessee, Inc. d/b/a Waste Management of Memphis, operates a facility in Memphis, Tennessee where it is engaged in waste transportation. The Union represents a unit of the Employer's truck drivers, roll-off employees, front-end employees, residential employees, helpers and mechanics employed at the Memphis facility. There are approximately 35 employees in the unit.

Following a hearing before a hearing officer of the Board, the Employer and the Union filed briefs with me. As stated at the hearing and in the parties'

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[1] I have taken official notice of the Employer's name as reflected in the Union's certification in Case 26-RC-8048. Accordingly, and consistent with the name of the Employer as reflected in the extension agreement, the Employer's name is hereby corrected.

briefs, this case presents two issues: (1) whether there is a contract bar to the petition; and (2) whether Jesse Allen, the Petitioner, is excluded from the unit.

The Union contends the petition is barred by the extension agreement executed by the parties in April 2005. The Union further contends that the petition should be dismissed and Allen should be excluded from the unit because he performs non-bargaining unit or supervisory duties.

On the other hand, the Employer and Petitioner contend there is no contract bar because the extension was for an indefinite period and the new agreement reached in October 2005 was not executed by both parties. The Employer also contends that Allen occupies a unit position and is not a supervisor because he does not use independent judgment.[2]

I have considered the evidence adduced during the hearing and the arguments advanced by the parties and, as explained below, I find there is no contract bar and that Allen should be included in the unit because he spends almost all of his time performing bargaining unit work.

I. CONTRACT BAR ISSUE

As noted above, the Union contends that the petition is barred by an agreement that extended the most recent contract.

A. FACTS

The Employer and the Union were parties to a collective-bargaining agreement that was effective from May 6, 2002 through May 5, 2005. In mid-

[2] The Petitioner did not file a brief and did not state on the record his position regarding his inclusion in the unit.

April 2005,[3] the parties executed an agreement that extended the collective-bargaining agreement through June 5 or until a successor agreement was reached, whichever occurred first. The agreement also provided that if no successor agreement was reached, the extension would continue day to day until written notice was given. Specifically, the extension agreement provides as follows:

> In the event no successor agreement is reached, this extension agreement shall automatically continue day to day unless and until written notice is served on the other party by certified mail to be received at least five (5) days prior to the date the notifying party desires to terminate the extension.

On October 18, the Employer gave the Union a final offer that included provisions covering holidays, vacations, incentive pay, hourly pay, sick/personal days, and funeral leave. The offer was not signed. The Union did not make a counter offer to the Employer's final offer but on October 20, Union Business Agent William Jones contacted the Employer's District Manager, Kevin McGrew, regarding whether the provisions in the offer relating to bereavement were correct. McGrew testified that he checked with the Employer's attorney who advised the provisions were correct.

On October 23, Business Agent Jones telephoned McGrew and left a voice mail message stating that the employees had voted to ratify the collective-bargaining agreement. The following day, October 24, the Petitioner filed the instant petition.

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[3] All dates are 2005 unless otherwise noted.

On October 27, Jones came to the Employer's facility and asked McGrew to sign a document entitled Articles of Agreement that reflected the terms of the ratified agreement. Jones had already signed the agreement, which provided that it was effective from May 6, 2005 to May 5, 2008. McGrew declined to sign the agreement both because the document needed to be reviewed and because he had received the petition in this matter. The record does not establish that any representative of the Employer has ever signed the Articles of Agreement or any other document reflecting those terms.

B. ANALYSIS

The burden of proving that a contract is a bar is on the party asserting the doctrine. *Road & Rail Services,* 344 NLRB No. 43, slip op. at 2 (2005), citing *Roosevelt Memorial Park*, 187 NLRB 517 (1970). The Union contends that the extension agreement should bar the petition. As explained below, I find that the Union has not met its burden of establishing a contract bar because the extension agreement was for an indefinite duration.

Concerning the extension agreement, the Board has long held that contracts having no fixed duration will not be considered a bar to a representation petition. See e.g., *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 121 NLRB 990 (1958). In *Frye & Smith, Ltd*., 151 NLRB 49, 50 (1965), the Board specifically held that an extension agreement would not operate as a bar to a petition if the extension was for an indefinite term. In *Frye*, the extension agreement included language that "maintain[ed] the provisions of the expired

agreement in effect for a period of 30 days or until a new contract was signed, whichever was sooner." Id.

In *Crompton Company, Inc*., 260 NLRB 417, 418 (1982), the Board cited *Frye* in finding that an extension agreement was not a bar to the petition because there was no fixed term to the extension agreement. Moreover, the Board noted in *Crompton* that when there is no fixed term, those wishing to file a representation petition are not apprised of the beginning and the ending of the open period for a representation petition to be appropriately filed. Id.

Here, in mid-April the parties signed an agreement that extended the collective-bargaining agreement through June 5 and provided that if no successor agreement was reached the extension agreement would automatically continue day to day unless one party gave at least five days notice of a desire to terminate the extension. Therefore, the extension agreement is of an indefinite duration, which precludes an accurate determination for the open period to timely file a representation petition, and thus is not a bar to the petition in this matter.

In arguing that the extension agreement is a bar, the Union relies on *ALJUD Licensed Home Care,* 345 NLRB No. 88 (2005). While that case held that automatic renewal could serve as a bar to a petition, it involved a contract that renewed for an additional three years – a definite term. Here, the agreement was extended for an indefinite term – from day to day unless termination notice was given.

At the hearing, the Union adduced evidence that a successor agreement had been reached and had been signed by the Union. However, the Employer never signed the agreement. As the Union apparently recognizes,[4] the successor agreement cannot serve as a bar because it was not signed by all the parties prior to the filing of the petition that it would bar. *Appalachian Shale Products*, 121 NLRB 1160, 1162 (1958); *De Paul Adult Care Communities*, 325 NLRB 681 (1998).

II. INCLUSION OF PETITIONER IN THE BARGAINING UNIT

Having determined that the petition is not barred, I turn to the issue of whether the Petitioner, Jesse Allen, is properly included in the unit. The Union claims that because Allen performs work that is only performed by dispatchers and supervisors, he is not properly included in the bargaining unit and is without authority to file the petition in this matter. As explained below, I find that his occasional exercise of non-unit or supervisory duties is not a sufficient basis for excluding him from the unit.

A. FACTS

The Employer employs 15 roll-off employees, 13 front-end loader employees, 3 residential employees, and 4 shop employees in the unit at the Memphis facility. Petitioner Allen, the lead driver in the roll-off group, is the most senior employee in the unit. Like all other drivers, he reports to Route Manager

[4] The Union does not contend in its post-hearing brief that the successor agreement should bar the petition in this case.

Charles Rice and Dispatcher Tarasha Wade. Allen is one of four lead employees, but is the only lead in the roll-off group.

Lead employees substitute for employees who are unable to work their assigned schedule and work on special projects assigned to them based upon their specific duties and experience. All lead employees receive the same rate of pay, which is higher than other bargaining unit employees. Both the 2002 through 2005 collective-bargaining agreement and the ratified agreement include lead employees in the bargaining unit.

As reflected in an October 4 memorandum from Rice, Allen is assigned to be on call every third weekend. Rice and Wade are assigned to be on call the other weekends. The person assigned to be on call does not have to be at work that day so long as they are available at the telephone number listed on the memorandum.

The October 4 memorandum was prepared to advise employees who to contact if they have a flat tire or some other problem on the weekend. In addition to providing telephone numbers for Rice, Wade, and Allen as being on call on specified dates, the memorandum contains telephone numbers for other personnel and vendors. Included are District Manager Kevin McGrew, Maintenance Manager John Duff; Maintenance Supervisor Domniac Powell, Davenport Wrecker (wrecker service), Hooper Machinery (compactor repair service), and Steepleton Tire (tire service). McGrew explained that the October 4

memorandum was created after a supervisor who had been on the weekend rotation schedule ceased working for the Employer.

Allen's weekend duties do not include dispatching inasmuch as Dispatcher Wade prepares the Saturday work schedule on Friday, so that employees know who has to work the next day. The weekend schedule is based upon customer demand and is usually prescheduled.

When a driver is unable to work their scheduled Saturday, the procedure is for the driver to contact either Rice or the weekend contact person. When that occurs, either Rice or the weekend contact person decides whether to divide the workload among the drivers scheduled to work that Saturday or to contact the designated replacement employee to come in to work.

Lead employees serve as the designated employee to be called into work. Thus, Allen would be called in to work a Saturday for a roll-off driver and one of the three lead employees for front end would be called in for a front end employee. The record does not establish that Allen had ever been contacted by a driver while serving as the weekend contact person. The record also contains no evidence concerning Allen's involvement in hiring, firing, disciplining, evaluating, or promoting other employees.

B. ANALYSIS

There is no evidence that Allen performs any dispatcher or potentially supervisory duties except for those duties he now performs every third Saturday

when he is on call as a replacement for a supervisor who is no longer employed. The remainder of his time Allen is a lead driver performing bargaining unit work.

The Union provides no case authority to support its position that Allen should be excluded from the Unit because he is now performing the on-call duties every third Saturday. Here, the record does not establish that Allen has ever called an employee in to work or exercise any other authority that might be considered as indicia of supervisory status.

Even assuming, as the Union contends, that the on-call duties are supervisory in nature, I find that Allen's occasional substitution for a supervisor is insufficient to warrant excluding him from the unit. At most, Allen is performing intermittent supervision of unit employees. In those circumstances the test is whether the part-time supervisor spends a "regular and substantial" portion of his time performing supervisory duties or whether such substitution is sporadic and insignificant. *Carlisle Engineered Products, Inc.*, 330 NLRB 1359, 1361 (2000); *Aladdin Hotel*, 270 NLRB 838, 840 (1984).

On the other hand, if the on-call duties are not supervisory but are simply non-unit work, Allen is arguably a dual function employee. Under well-established Board law, "[t]he test for determining whether a dual-function employee should be included in a unit is 'whether the employee [performs unit work] for sufficient periods of time to demonstrate that he . . . has a substantial interest in the unit's wages, hours, and conditions of employment.'" *Harold J. Becker Co.*, 343 NLRB No. 11 (2004) citing *Air Liquide America Corp*., 324 NLRB

661, 662 (1997). Here, Allen spends the vast majority of his time performing unit work and is therefore properly included in the unit.

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union claims to represent certain employees of the Employer.
4. The Union is a labor organization within the meaning of Section 2(5) of the Act.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

   INCLUDED: All full-time and regular part-time truck drivers, roll-off employees, front-end employees, residential employees, helpers and mechanics, including lead employees, employed by the Employer at its Memphis, Tennessee facility.

EXCLUDED: All other employees, including office clerical employees, professional employees, guards and supervisors as defined in the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by *Teamsters Local 667*. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been

established. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.).

To be timely filed, the list must be received in the Regional Office, The Brinkley Plaza Building, 80 Monroe Avenue, Suite 350, Memphis, TN 38103-2416, on or before **November 25, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (901) 544-0008 or at (615) 736-7761 or may be sent by e-mail to **Region26@nlrb.gov or Resnash@nlrb.gov**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires

an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Service*s, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **December 2, 2005.** The request may not be filed by facsimile.

DATED: November 30, 2005.

/S/[Ronald K. Hooks]

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Ronald K. Hooks, Regional Director
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